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No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1930

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES ON REARGUMENT

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OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The case is here on a question of law certified to this Court by the Court of Claims, pursuant to Section 3 (a) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The amended certified question is (R. 11):

> Where a motor cycle is sold by the manufacturer thereof to a municipal corporation of a State, which has authorized its purchase

solely for police purposes, and said motor cycle has at all times been exclusively used for such purposes, is the transaction within the provisions of sec. 600, subdivision (2) of the revenue act of 1924 (43 Stat. 322), and taxable thereunder, notwithstanding the decision of the Supreme Court in the case of *Panhandle Oil Co.* v. *The State of Mississippi,* decided May 4, 1928, 277 U. S. 218?

STATUTES INVOLVED

The relevant section of the Revenue Act of 1924, c. 234, 43 Stat. 253, 322 (U. S. C. Title 26, Sec. 881), is as follows:

> SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—
>
> * * * * *
>
> (2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body.

A similar tax was imposed by Section 600 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 316, Sec-

tion 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, and Section 600 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 93 (U. S. C. App. Title 26, Sec. 881).

REGULATIONS AND RULINGS

The first published regulation of the Treasury Department in relation to the taxation, under Section 600 of the Revenue Act of 1917, of articles sold to States or political subdivisions thereof, appeared on May 31, 1918, in Regulations 44, Article VII, as follows:

> * * * Articles sold to a State or a political subdivision thereof for use in carrying on its governmental operations are not subject to the tax.

Regulations 47 (T. D. 2832), published in May, 1919, following the passage of the Revenue Act of 1918, contained the following provision:

> ART. 10. *Sales to the Government or a State.*—* * * Articles sold to a State or a political subdivision thereof by the manufacturer for use in carrying on its governmental operations are not subject to the tax. Articles sold by the manufacturer to a State, county, or municipal institution are also exempt from tax when paid for entirely out of public money.

Following the publication of this regulation, the Secretary of the Treasury requested an opinion from the Attorney General of the United States on the question whether or not the excise tax imposed

by Section 900 of the Revenue Act of 1918 applied to sales of the enumerated articles to a State or political subdivision thereof. The Attorney General rendered an opinion, 31 Opinions of Attorneys General 520, as follows:

DEPARTMENT OF JUSTICE,
July 7, 1919.

SIR: I have the honor to acknowledge receipt of your letter of May 14, requesting my opinion upon the question whether the excise tax imposed by section 900 of the Revenue Act of February 24, 1919 (40 Stat. 1122), upon the manufacturer, producer, or importer upon the price for which articles enumerated in the section are sold, applies upon sales of such taxable articles to a State or a political subdivision thereof.

Section 900 provides (40 Stat. 1122):

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—"

Then follow a number of subdivisions specifying various articles and the rate per centum of the tax levied thereon. Subdivision 10 of the section is as follows:

"Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the

German Government in the present war, 10 per centum;"

Section 903 (40 Stat. 1123) provides:

"That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe."

It is my opinion that this tax applies to sales to a State or a political subdivision thereof, except those articles embraced by subdivision 10.

The exception contained in subdivision 10 indicates the congressional intent that the tax shall apply to the articles specified in the other subdivisions.

The United States, of course, can not tax the property or the instrumentalities of a State, but here the tax is not laid upon either the property or the instrumentalities of the State. If it reaches the State at all it does so only in an indirect manner. The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden, therefore, if it falls upon the State, does so indirectly. Such an incidental and indirect effect results from the payment of all taxes, and while this tax

may be traced more directly into the cost to the State, yet the fact remains that it is an incidental and indirect burden upon the State and not the taxation of either its property or its instrumentalities. *Snyder* v. *Bettman*, 190 U. S. 249; *Baltic Mining Company* v. *Massachusetts*, 231 U. S. 68; *Kansas City, Fort Scott & Memphis Railway Company* v. *Kansas*, 240 U. S. 227; *The American Manufacturing Company* v. *The City of St. Louis*, decided by the Supreme Court on June 9.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

As a result of this opinion of the Attorney General, on July 22, 1919, Treasury Decision 2897 was issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. This decision amended Article 10 of Regulations 47 under the Revenue Act of 1918 to read as follows:

ART. 10. *Sales to the Government or a State.*—* * * The tax also applies to the articles enumerated in this section, except to those enumerated under subdivision (10), when sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations.

This provision was also contained in the revision of Regulations 47 under the 1918 Act in December,

1920 (T. D. 3132), and similar provisions were contained in revisions of January, 1922 (T. D. 3278), August, 1924 (T. D. 3630), and May, 1926 (T. D. 3862), under the 1921, 1924, and 1926 Acts. The provision under the 1924 Act, which is the one directly involved in the present case, is as follows:

> ART. 10. *Sales to the Government or a State.*—The tax applies to articles enumerated in Section 600, except those enumerated under subdivision 6 (see Art. 19), when sold to the United States Government. The same is true of articles sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operation. * * *

STATEMENT OF THE CASE

The case was heard by the Court of Claims on an agreed statement of facts. (R. 2.) The Indian Motocycle Company, a Massachusetts corporation, on or about June 16, 1925, sold a motor cycle to the City of Westfield, Massachusetts. The total amount paid by the City of Westfield was $290.33, of which $13.83 appeared on the invoice as "amount of tax." (R. 2) This $13.83 was five per cent of the price of the motor cycle.

The motor cycle was purchased by the City of Westfield for police purposes, and was used at all times exclusively for those purposes. (R. 3.)

The Commissioner of Internal Revenue assessed a tax of $13.83 against the plaintiff company under the provisions of Subdivision 2 of Section 600 of the Revenue Act of 1924, which tax the plaintiff paid. (R. 3.) Subsequently, the plaintiff filed a claim for refund, setting out as a ground therefor that (R. 3)—

> * * * the regulations making taxable sales of motor-cycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution.

The claim was disallowed by the Commissioner of Internal Revenue (R. 3, 4), and the plaintiff brought this suit to recover $13.83 with interest (R. 6–10).

PRELIMINARY STATEMENT

This case was heard by the Court of Claims in conjunction with the case of *Wheeler Lumber Bridge & Supply Company* v. *The United States*, 281 U. S. 572. After argument before that court, questions in respect to each of these cases were certified to this Court. In an opinion delivered May 7, 1929, following argument in both cases, this Court dismissed the certificates and remanded the cases for further proceedings, on the ground that the certificates were improper in that the answer to the question decided the case. On June 3, 1929, this Court withdrew its opinion. On May 26, 1930, this

Court rendered an opinion in *Wheeler Lumber Bridge & Supply Company* v. *The United States*, *supra*, holding that the question was properly certified, and on the same day set this case for reargument.

Upon the previous submission of this case the position of the Government was that the present case is governed by the decision of this Court in the *Panhandle Oil Co. case* (277 U. S. 218), and that accordingly the answer to the questions certified by the Court of Claims is that the transaction here involved is not taxable under Section 600 of the Revenue Act of 1924. (See Brief of the United States originally filed in this case.)

The Court having directed a reargument, we have ventured in this brief to emphasize the distinction between the incidence of the tax under consideration in the *Panhandle case* and the incidence of the tax here involved, and to argue that the *Panhandle case* must be limited to its own facts and that, thus limited, it does not govern the case at bar; and that, in any event, the effect of the tax upon the exercise of any governmental function is so remote and indirect as not to transcend the constitutional limitation upon the Federal power of taxation.

SUMMARY OF ARGUMENT

This case is distinguishable from the *Panhandle case*. There the incidence of the tax was the sale of the article. Here it is manufacture, production, or importation *and* sale.

The tax was not imposed upon the State, or upon any instrumentality of the State. It was imposed upon the manufacturer with respect to all sales of his products. In this case the manufacturer added the amount of the tax to his bill, but its payment by the City of Westfield was part of the bargain between the parties, and the tax was not in any sense imposed upon the City. Indeed, it may fairly be assumed that the transaction between the parties would have been precisely the same if the tax had been imposed upon the manufacturer of the motor cycle, regardless of its sale.

The manufacturer was not a public agent or instrumentality, and the principle that the Federal Government may not impose any tax on a State or a political subdivision thereof is not involved. The question is whether in taxing the manufacturer because of the sale to the City there has been a substantial invasion of the functions of government delegated to the municipality by the State.

A tax imposed generally upon the manufacture, production, or importation of articles is not unconstitutional when applied to articles ultimately sold to a State, and to impose a tax upon articles sold by the manufacturer, producer, or importer has no different effect so far as the purchaser is concerned. The effect of this tax upon the exercise of any governmental function was too remote and indirect to amount to an unconstitutional curtailment of the powers of the State.

ARGUMENT

I

THE TAX IN THE INSTANT CASE IS DISTINGUISHABLE FROM THE TAX IN THE PANHANDLE CASE. BOTH ARE EXCISE TAXES, BUT IN THE INSTANT CASE THE TAX IS IMPOSED ON THE PRIVILEGE OF MANUFACTURING AND THEREAFTER SELLING A MOTOR CYCLE; WHEREAS, IN THE PANHANDLE CASE, THE TAX WAS IMPOSED ON THE PRIVILEGE OF SALE ALONE

The tax reenacted by Section 600 of the Revenue Act of 1924 (*supra*, p. 2) is an excise tax imposed on the privilege of manufacturing, producing, or importing *and* selling the article specified. In the *Panhandle case* the Mississippi tax statute in question provided—

> Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4¢) per gallon upon the sale of gasoline by such dealer in this state. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer. (Laws of Mississippi 1926, ch. 119, Sec. 1.)

The Mississippi tax was a tax upon the privilege of selling gasoline, and not upon the privilege of production, or production and sale. It was directed to the sale, whereas in the instant case the tax is imposed upon manufacture followed by sale, the occasion for its collection being the sale of the

manufactured article. Thus the incidence of the tax in the present case includes a transaction, namely, the manufacture of the finished article, to which the City was not a party and in which it was not concerned. In this respect there is a partial analogy to the tax on transportation had at the vendor's instance and as his means of getting his lumber to the place of sale and delivery, which was involved in *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572. There it was said (p. 579):

> The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True, it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. *United States* v. *Normile,* 239 U. S. 344, 348. It follows that the tax on the transportation can not be regarded as a tax or burden on the sale. *Cornell* v. *Coyne,* 192 U. S. 418. As the tax is not laid on the sale or in any wise measured by it the case of the *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, referred to in the question and relied on by the plaintiff, is not in point.

In the case at bar the tax *is* laid on the manufacture *and* the sale, and is measured by the sale. So that the instant case lies between the *Panhandle Oil Co. case* and the *Wheeler Lumber Co. case,* and is distinguishable from both of these cases. Had the

tax been imposed upon manufacture alone, decision would have been controlled by the *Wheeler Lumber Co. case.* Had the tax been imposed upon the sale alone, the question would have been identical with that answered in the *Panhandle case.* If it be said that these distinctions are narrow and finely drawn, it may well be answered that the case at bar is quite as close to the *Wheeler Lumber Co. case* as it is to the *Panhandle case,* and that unless the doctrine of the *Panhandle case* is so broad as to extend the limitation upon the power of Congress there applied to a tax imposed upon the manufacture, production, or importation of articles, if the same is brought into operation and measured by the sale of such articles, the distinction is vital and controlling in this case.

II

THE TAX WAS NOT IMPOSED UPON THE STATE, OR UPON ANY INSTRUMENTALITY OF THE STATE. IT WAS IMPOSED UPON THE MANUFACTURER WITH RESPECT TO ALL SALES OF HIS PRODUCT

In this case the manufacturer added the amount of the tax to his bill, but its payment by the City of Westfield was part of the bargain between the parties, and the tax was not in any sense imposed on the City. *Lash's Products Co.* v. *United States,* 278 U. S. 175; *Snyder* v. *Bettman,* 190 U. S. 249. Indeed, it may fairly be assumed that the price paid by the City would have been precisely the same if the tax had been imposed on the manufacture of the motor cycle, regardless of its sale.

III

NOR WAS THE MANUFACTURER, UPON WHOM THE TAX WAS IMPOSED, AN AGENT OR EMPLOYEE OF THE STATE OR MUNICIPALITY

In its relationship to the City of Westfield the manufacturer was merely a vendor in an isolated transaction of sale. *Cf. Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

IV

THE EFFECT OF THIS TAX IMPOSED UPON THE MANUFACTURER WITH RESPECT TO ALL SALES OF HIS PRODUCT UPON THE EXERCISE OF ANY GOVERNMENTAL FUNCTION OF THE STATE WAS TOO REMOTE AND INDIRECT TO AMOUNT TO AN UNCONSTITUTIONAL CURTAILMENT OF THE POWERS OF THE STATE

Since the tax here concerned was not directly laid upon a State or upon any of its instrumentalities, the principle that the Federal Government may not impose any such tax is not involved. The question presented is whether in taxing the manufacturer because of the sale to the City there has been a substantial invasion of the functions of government delegated to the municipality by the State. In so far as taxes not directly laid upon a State or its instrumentalities are concerned, the limitation is not absolute and must receive a practical construction which permits both the National Government and the State Governments to exercise their individual functions without serious impairment or interference. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, *supra*. There is no express provision in the Constitution which guarantees to the several States

immunity from interference by the Federal Government in this respect. The principle of noninterference rests rather upon necessary implication from the relations of the States and the United States under the Constitution, and is essential to the preservation of a dual system of government. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Collector* v. *Day*, 11 Wall. 113; *Burnes National Bank* v. *Duncan*, 265 U. S. 17. But to extend this implied limitation too far is to defeat its very purpose by imposing unnecessary restrictions upon the sovereign power of taxation possessed by both the State and National Governments. And so distinctions must be carefully drawn, and their validity must be judged by the practical effect of the exercise of functions concededly possessed by one government upon the exercise of governmental functions concededly possessed by the other. The delicacy of balance in the application of this implied limitation upon the power of taxation is clearly shown in *Metcalf & Eddy* v. *Mitchell, supra*, where it was said (p. 523):

> Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum interference each with the other; and that limitation can not be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina* v. *United States*, 199 U. S. 437, 461; *Flint* v. *Stone Tracing Co.*, 220 U. S. 107, at 172) or the appropriate exercise

> of the functions of the government affected by it. (*Railroad Co.* v. *Peniston,* 18 Wall. 5, at 31.)

In *Snyder* v. *Bettman,* 190 U. S. 249, *supra,* where a Federal succession tax upon the transmission of property by legacy to a municipality was sustained, this Court said (pp. 253–254):

> Conceding fully that Congress has no power to impose a burden upon a State or its municipal corporations, the question in each case is whether the tax is direct or incidental.

Viewing the question in the light of the nature and extent of the burden imposed, the specification of the sale of his property as the occasion for the collection of a tax from a manufacturer can not properly be said to impose a direct burden upon the purchaser which under any practical construction of the limitation upon the power of taxation may be said to curtail the exercise of any governmental power, when the purchaser happens to be a State or the Nation. The burden and effect of such a tax, when judged in terms of practical effect, is quite as remote and indirect as was the transportation tax considered in the *Wheeler Lumber Co. case, supra.*

This Court and other Federal courts have held many activities and instrumentalities of the States to be subject to the burden of Federal taxation, where such taxation constituted only an indirect interference with the exercise by the States of their

governmental powers. There follows a partial list of cases in which such taxes have been sustained:

Tax on notes issued by bank operating under State franchise: *Veazie Bank* v. *Fenno,* 8 Wall. 533.

Tax on notes issued by municipality and used as money: *National Bank* v. *United States,* 101 U. S. 1.

Succession tax on transfer of property by will to municipality: *Snyder* v. *Bettman, supra.*

License tax on sale of intoxicating liquor by State: *South Carolina* v. *United States,* 199 U. S. 437.

Capital stock tax on bank owned and operated by a State: *State of North Dakota* v. *Olson* (C. C. A. 8th), 33 F. (2d) 848; appeal dismissed, 280 U. S. 528.

Taxes on incomes of consulting engineer, real-estate expert, sewer contractor, and attorney employed by State or municipality: *Metcalf & Eddy* v. *Mitchell, supra; Lyons* v. *Reinecke* (C. C. A. 7th), 10 F. (2d) 3; *Mesce* v. *United States,* 64 C. Cls. 481, certiorari denied, 278 U. S. 612; *Sackley* v. *United States,* 65 C. Cls. 304, certiorari denied, 278 U. S. 609; *Lucas* v. *Howard,* 280 U. S. 526, reversing (C. C. A. 5th) 29 F. (2d) 895; *Lucas* v. *Reed,* 281 U. S. 699, reversing (C. C. A. 3d) 34 F. (2d) 263; *Blair* v. *Byers* (C. C. A. 8th), 35 F. (2d) 326.

Consideration of the decisions of this Court, preceding and subsequent to the decision in the *Panhandle case,* we believe, warrants the conclusion that

that case has extended the implied constitutional limitation upon the governmental function of taxation to the very limit to which that limitation can properly be extended without defeating its own purpose; and we therefore respectfully submit that the doctrine of that case should not be held to govern the decision in this.

We are not unmindful that the foregoing argument is inconsistent with the brief for the Government filed upon the original submission of this case, but have felt justified in submitting this brief in view of the Court's direction that the case be reargued. The only doubt which we have in regard to the argument is whether the distinction urged is sufficient to escape the effect of the ruling of this Court in the *Panhandle case*. If it were not for that decision, we should not have the slightest hesitation in urging the Court to answer the question certified in the affirmative. We believe it should be so answered.

CONCLUSION

The question certified should be answered in the affirmative.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

CHARLES B. RUGG,
Assistant Attorney General.

FRED K. DYAR,
H. BRIAN HOLLAND,
Attorneys.

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